

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED

99 APR 16 PM 2:30

DIST. OF SOUTH CAROLINA

IN RE:

Johnnie Mae Davis,

Debtor.

C/A No. 99-00837-W

Adv. Pro. No. 99-80089-W

Johnnie Mae Davis,

Plaintiff,

v.

BMW Financial Services, NA, Inc.
d/b/a Land Rover Financial Services,

Defendant.

JUDGMENT

ENTERED

APR 19 1999

Chapter 13

S. R. P.

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the motion of the Debtor, Johnnie Mae Davis, for the turn over of a 1997 Land Rover Discovery SE vehicle from the Defendant, BMW Financial Services, NA, Inc. d/b/a Land Rover Financial Services, is granted and BMW Financial Services, NA, Inc. d/b/a Land Rover Financial Services shall turn over the 1997 Land Rover Discovery SE vehicle to the Debtor within ten (10) days from the date of entry of this Order. Based upon this finding, the Debtor's motion for a temporary restraining order is moot; however, as part of this Order and as stipulated on the record by its counsel, BMW Financial Services, NA, Inc. d/b/a Land Rover Financial Services shall not dispose of the vehicle in any other means prior to turning it over to the Debtor. Additionally, the Court will conduct a pre-trial conference, along with the continued confirmation hearing, on Thursday, May 6, 1999 at 10:30 a.m. in the United States Courthouse, Spartanburg, South Carolina, to determine if there are any other issues that must be addressed in this adversary proceeding.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,

April 16, 1999.

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CERTIFICATE OF MAILING
The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

APR 19 1999

~~DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE~~

SHEREE R. PHIPPS

Deputy Clerk

✓ Bernstein
✓ Petree McCoy

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
at ___ o'clock & ___ min
APR 16 1999
BRENDA K. ARGOE, CLERK
United States Bankruptcy Court
Columbia, South Carolina (7)

IN RE:

Johnnie Mae Davis,

Debtor.

Johnnie Mae Davis,

Plaintiff,

v.

BMW Financial Services, NA, Inc.
d/b/a Land Rover Financial Services,

Defendant.

C/A No. 99-00837-W

Adv. Pro. No. 99-80089-W

ORDER

ENTERED

Chapter 13

APR 19 1999

S. R. P.

THIS MATTER comes before the Court upon the motion filed by the Plaintiff/Debtor, Johnnie Mae Davis ("Debtor" or "Ms. Davis") for a temporary restraining order and demand for return of property pursuant to 11 U.S.C. §542.¹ After receiving the testimony and considering all the evidence, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Federal Rules of Civil Procedure, made applicable by Rule 7052 of the Federal Rules of Bankruptcy Procedure.²

FINDINGS OF FACT

On June 18, 1998, Ms. Davis entered into a lease agreement ("Lease") with the Defendant

¹ Further references to the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, shall be by section number only.

² The court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

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BMW Financial Services, NA, Inc. d/b/a Land Rover Financial Services (“Land Rover Financial”) to lease a 1997 Land Rover Discovery SE vehicle (the “Vehicle”) for a period of forty-two (42) months for \$474.00 per month. At the end of the lease period, including a Disposition Fee of \$350.00 charged by Land Rover Financial, Ms. Davis would have paid \$20,588.68 pursuant to the terms of the Lease.

Ms. Davis concedes that the December 1998 and January 1999 lease payments were not made when due and as a result, Land Rover Financial repossessed the Vehicle on January 21, 1999. The following day, Land Rover Financial sent Ms. Davis a “Right To Redeem” letter which stated as follows:

“In order to redeem the Collateral, you (debtor) have ten (10) days from the day of this letter to pay by certified funds the balance due on your indebtedness plus late charges and expenses of repossession, holding and preparing the property for sale.”

The date of the Right to Redeem letter was January 22, 1999. On the 10th day from the date of the “Right To Redeem” letter, Ms. Davis filed a Chapter 13 bankruptcy petition. On March 22, 1999, Ms. Davis filed this adversary proceeding seeking the return of the Vehicle based upon her right of redemption. Ms. Davis also filed a motion for a temporary restraining order pending the resolution of the adversary proceeding to enjoin the sale of the Vehicle by Land Rover Financial. A hearing was held on the motion for a temporary restraining order at which time counsel for Land Rover Financial took the position that the Lease was terminated pre-petition based upon the default in payment by Ms. Davis.

The testimony of Ms. Davis was proffered at the hearing that she never received a “Right to Cure” letter. In response to the proffer, counsel for Land Rover Financial stipulated that no

“Right To Cure” letter was ever sent to Ms. Davis prior to repossession.

On March 30, 1999, Ms. Davis filed an amended Chapter 13 plan seeking to assume the Lease with Land Rover Financial by continuing to make monthly payments of \$474.04 and curing the default of \$948.08 by making a single payment outside of the plan within ten (10) days of the entry of the Order of Confirmation. Ms. Davis also plans to pay unsecured creditors 100% of their claims at 8.25% interest.

CONCLUSIONS OF LAW

Based upon the stipulation of the parties that the Lease agreement is a true lease and not a disguised security agreement, the sole issue before the Court is whether the Lease terminated pre-petition or remains an unexpired lease agreement subject to being assumed and cured through the Debtor’s Chapter 13 Plan and, thus, subject the Vehicle to immediate turnover to Ms. Davis.

Pursuant to Section 36 of the Lease, the choice of law provision provides that the “Lease will be subject to the laws of the state where you [Debtor] reside when you sign it.” Therefore, the application of South Carolina law is appropriate. Section 37-1-301 of the South Carolina Code, provides that the South Carolina Consumer Protection Code applies to all consumer credit transactions. “‘Consumer credit transaction’ means a consumer credit sale (§37-2-104) or a refinancing or consolidation thereof, a consumer lease (§37-2-106), or a consumer rental-purchase agreement (§37-2-701).” South Carolina Code Ann. §37-2-106(11). Section 37-2-106 defines a consumer lease as follows:

- (1) “Consumer lease” means a lease of goods
 - (a) Which a lessor regularly engaged in a business of leasing makes to a person, other than an organization, who takes under a lease primarily for personal, family, or household purposes.

- (b) In Which the amount payable under the lease does not exceed twenty-five thousand dollars, and
 - (c) Which is for a term exceeding four months.
- (2) "Consumer lease" does not include a lease made pursuant to a lender credit card or similar arrangement.

South Carolina Code Ann. §37-2-106. The subject Lease is clearly one by a lessor regularly engaged in the business of leasing and the subject collateral of the Lease is used for personal, family, or household purposes. Additionally, as stated in the Findings of Fact, the Lease is for a period of forty-two (42) months and at the end of the lease period, including a Disposition Fee of \$350.00 charged by Land Rover Financial, Ms. Davis would have paid \$20,588.68. For these reasons, the Court finds that the Lease falls within this definition of a consumer lease.

A consumer's rights in a lease based upon a default by nonpayment under the South Carolina Consumer Protection Code are set forth in § 37-5-111(1) of the South Carolina Code.

- (1) With respect to a secured or unsecured consumer credit transaction payable in two or more installments, except as provided in subsection (2), after a default consisting only of the consumer's failure to make required payment, a creditor, because of that default, may neither accelerate maturity of the unpaid balance of the obligation, nor take possession of or otherwise enforce a security interest in goods that are collateral until twenty days after a notice of the consumer's right to cure (§37-5-110) is given. Until expiration of the minimum applicable period after the notice is given, the consumer may cure all defaults consisting of a failure to make the required payment by tendering the amount of all unpaid sums due at the time of the tender, without acceleration, plus any unpaid deficiency or deferral charges. Cure restores the consumer to his rights under the agreement as though the default had not occurred.

South Carolina Code Ann. §37-5-111(1). Because counsel for Land Rover Financial has stipulated that a "Right To Cure" notice was not sent following the default of the non-payment in December of 1998 and January of 1999 and because the proffer of Ms. Davis's testimony was

that she did not receive a "Right to Cure" notice, the repossession of the collateral on January 21, 1999 was in violation of this statute and is void pursuant to South Carolina Code § 37-5-111(7) which provides that "[a]ny repossession of collateral or rented property in violation of this section is void and the creditor is liable for conversion."

As additional grounds to support Ms. Davis's request for turn over of the Vehicle, the language of the Lease agreement itself provides a period of time for Ms. Davis to cure a default when the default is based upon a missed payment. Section 34 of the Lease is titled "DEFAULT" and provides as follows:

"You will be in default under this Lease if (a) you fail to make a Monthly Payment when due; or (b) you fail to keep any of your promises under this Lease; or (c) you or a guarantor become insolvent or die; or (d) if any information in your credit application or a guarantor's credit application is false or misleading. If you are in default, we may do any or all of the following: (I) take any reasonable measures to correct the default or save us from loss, and you must pay us our cost and expenses; or (II) **subject to your right to reinstate your Lease for failing to make a payment when it is due, terminate this Lease and your rights to possess and use the Vehicle**, and if you do not return the Vehicle to us voluntarily, take possession of the Vehicle by any method permitted by law; (III) determine your Early Termination Liability (Section 21) which you must pay when we bill you; or (IV) pursue any other remedy permitted bylaw. We may use some or all of your security deposit to pay what you owe. If we get back the Vehicle, we may dispose of it by public or private sale We will add to the amount you owe all related expenses, fees and legal costs including attorney's fees we incurred to repossess, store, restore, and/or dispose of the Vehicle." (emphasis added).

The statement that "subject to your right to reinstate your lease for failing to make a payment when it is due" is of particular importance in that the only basis for the default presented to the Court is the failure of Ms. Davis to make the monthly payments when due. As the

termination of the Lease is subject to Ms. Davis's right to reinstate and as the term "reinstate" is left undefined and the time period to reinstate is unknown, the Court must conclude that there was no pre-petition termination of the Lease based upon a right of Ms. Davis to reinstate the Lease.

Additionally, Ms. Davis received a "Right To Redeem" letter from Land Rover Financial which gave her a period of ten (10) days to cure the default. Ms. Davis filed her Chapter 13 Bankruptcy Petition on the tenth day and therefore Ms. Davis still had an interest in the Vehicle pursuant to this letter. This Court has consistently held that a debtor's right of redemption when the collateral subject to a security interest has been repossessed pre-petition, is a sufficient interest in property so that the property at issue is property of the estate and subject to being turned over to a Chapter 13 debtor.

In re Leverette [118 B.R. 407 (Bkrcty. D.S.C. 1990)] and In re Mathews, 118 B.R. 398 (Bkrcty. D.S.C. 1989) hold that the right of redemption provided to a debtor pursuant to South Carolina Code Ann. § 36-9-506 (1976) is a sufficient interest in property to be included in the § 541 definition of property of the estate. The debtor's right of redemption is available to the debtor in this case because the automobile, though lawfully repossessed prepetition by First Financial Corporation, Corp., had not been sold prior to the filing of the debtor's petition. Therefore, pursuant to § 542, the debtor is entitled to immediate return of the vehicle.

Gatling v. First Financial Corp. (In re Gatling), 93-74984-D; C-93-8301-D (Bkrcty. D.S.C. 3/11/94). Also see Green v. Wachovia Bank of South Carolina (In re Green), 94-73849-W, C-94-8200-W (Bkrcty. D.S.C. 1/27/95).

For all of these reasons, the motion of the Debtor to compel Land Rover Financial to turn over the Vehicle is granted and Land Rover Financial Services shall turn over the 1997 Land

Rover Discovery \$E to the Debtor within ten (10) days from the date of entry of this Order.³

Based upon this finding, the Debtor's motion for a temporary restraining order is moot; however, as part of this Order and as stipulated on the record by its counsel, Land Rover Financial shall not dispose of the Vehicle in any other means prior to turning the Vehicle over to the Debtor.

Additionally, the Court will conduct a pre-trial conference, along with the continued confirmation hearing, on Thursday, May 6, 1999 at 10:30 a.m. in the United States Courthouse, Spartanburg, South Carolina, to determine if there are any other issues that must be addressed in this adversary proceeding.

AND IT IS SO ORDERED.

Columbia, South Carolina,
April 16, 1999.


UNITED STATES BANKRUPTCY JUDGE

³ Land Rover Financial has not yet asked for adequate protection of its interest in the Vehicle based upon its position that the Lease terminated pre-petition.

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

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SHEREE R. PHIPPS

Deputy Clerk

✓ Bernstein
✓ Reeves-McCoy